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IN THE

Supreme Court of the United States

OCTOBER 1942 TERM

No. 504

ROBERT G. EWALD,
Petitioner,
vs.
THE PEOPLE OF THE STATE OF MICHIGAN,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. THE PETITION FOR WRIT OF CERTIORARI IS INSUFFICIENT UNDER THE APPLICABLE COURT RULES TO CONFER JURISDICTION UPON THIS COURT TO REVIEW THE JUDGMENT OF THE SUPREME COURT OF MICHIGAN.

Rule 38, Section 2, of the Revised Rules of the Supreme Court of the United States (adopted February 13, 1939, effective February 27, 1939) fixing the requirements for a petition for writ of certiorari to review a decision of the supreme court of a state provides:

> "The petition shall contain a summary and short statement of the matter involved; a statement particularly disclosing the basis upon which it is con-

> tended that this court has jurisdiction to review the judgment or decree in question. (See Rule 12, Par. 1);"

that portion of Rule 12, Paragraph 1, relating to appeals from a state court requires a jurisdictional statement in the petition; the text of the rule is as follows:

> "If the appeal is from a state court the statement shall include a statement of the grounds upon which it is contended the questions involved are substantial (*Zacht v. King,* 260 U. S. 174, 176, 177); specify the stage in the proceedings in the court of first instance, and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e. g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears, (e. g., ruling on exception, portion of the court's charge and exception thereto, assignment of error) as will support the assertion that the rulings of the court were of a nature to bring the case within the statutory provision believed to confer jurisdiction on this court. The provisions of this paragraph, with appropriate record page references, must be complied with when review of a state court judgment is sought by petition for writ of certiorari. (See Rule 38, Par. 2.)"

A summary of the court rule requires the jurisdictional statement to contain the following:

> (a) The stage in the state court proceedings to which, and the manner in which, the federal questions were raised;
>
> (b) The method of raising federal questions;

(c) The way in which they were passed upon by the state court;

(d) Specific reference to the record where the federal questions appear.

An examination of the petition for writ of certiorari will show that no proper jurisdictional statement has been made to this court. No reference is made to any constitutional question presented to the state court, and no decision on any constitutional question appears in the record. The "Statement of Jurisdiction" contained in petitioner's brief refers to Section 237 (b) of the Act of Congress of February 13, 1925 and then states that the judgment of the Supreme Court of Michigan violated the Fourteenth Amendment to the Federal Constitution because petitioner was tried in a court not having competent jurisdiction, and because he was not confronted by the witnesses against him. The statement does not refer to any part of the record in the state court in which petitioner asserted any of the foregoing claims.

The petitioner is not in a position to comply with Rule 12, aforementioned, because no federal question was raised in the state court, as will appear more fully from the discussion which follows. Because the court rule was not complied with, the petition for writ of certiorari should be denied.

II. NO FEDERAL QUESTION CONSTITUTING AN APPROPRIATE GROUND FOR REVIEW WAS PRESENTED IN OR DECIDED BY THE STATE COURT.

The issuance of a writ of certiorari by the Supreme Court of the United States is a matter within the discretion of the Court. "Upon application to this Court for review of the judgment of a state court, it is the petitioner's burden to show affirmatively that we have jurisdiction." (Justice Stone in *Memphis Natural Gas Company v. Beeler,* 315 U. S. 649, 62 Sup. Ct. Rep. 857.) It is respondent's position that petitioner has not affirmatively shown that this Court has jurisdiction to review the judgment of the state court.

The petitioner in his brief in support of the petition for writ of certiorari, under the heading, "Statement of Jurisdiction," claims that this Court has jurisdiction by virtue of Section 237 (b) of the Act of Congress of February 13, 1925, Chapter 229, 43 Statutes 936. Respondent maintains that this statute does not give the Court jurisdiction in the case at bar. The statute provides that this Court can review a state court decision where there is "drawn in question the validity of a treaty or statute of the United States, or where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States." At no point in the state court proceedings was there "drawn in question" any right, title, privilege or immunity claimed by petitioner under the Constitution of the United States. Petitioner did not claim during the trial in the lower court, nor in

the Supreme Court of Michigan, that he was denied any right guaranteed to him under the Federal Constitution, so no problem of construing the Federal Constitution was "drawn in question" to justify this Court in granting certiorari to review the proceedings in the state court.

An examination of the record in the trial court, and of the opinion of the Supreme Court of Michigan, will show that no Constitutional question was presented or decided by the state court. There is not even a single reference to the Federal Constitution in the proceedings below. Petitioner's only claim in this Court is that the Supreme Court of Michigan by its judgment deprived him of certain constitutional rights, but because no such claim was asserted in the state court, or in any manner brought to the attention of that court, this Court should not review the proceeding. As was stated in *Dewey v. Des Moines,* 173 U. S. 193, 199:

> "It is not enough that there may be somewhere hidden in the record a question which, if raised, would be of a Federal nature. *Hamilton Mfg. Company v. Mass.,* 6 Wall. 632. In order to be available in this Court some claim or right must have been asserted in the court below by which it would appear that the party asserting the right founded it in some degree upon the Constitution or laws or treaties of the United States. In such case, if the court below denied the right claimed, it would be enough; or if it did not in terms deny such right, if the necessary effect of its judgment was to deny it, then it would be enough. *But the denial, whether express or implied, must be of some right or claim founded upon the Constitution or the laws or treaties of the United States, which had in some manner been brought to the attention of the court below.*"

Supported by *Mellon v. O'Neil,* 275 U. S. 212, 48 Sup. Ct. Rep. 62, 72 L. ed. 245; *McGoldrick v. Gulf Oil Corporation,* 309 U. S. 2, 60 Sup. Ct. Rep. 375, 84 L. ed. 536. The peti-

tioner cannot point out to this Court any place in the record in which he urged the state court to reverse his conviction because he was denied a right granted to him by the Fourteenth Amendment to the Federal Constitution, and consequently it cannot be said that the Supreme Court of Michigan denied petitioner any federal right because

> "A claim or right which has never been made or asserted cannot be said to have been denied by a judgment which does not refer to it. *Hamilton Company v. Mass.*, 6 Wall. 632. A point that was never raised cannot be said to have been decided adversely to a party who never set it up or in any way alluded to it. Nor can it be said that the necessary effect in law of a judgment which is silent upon the question is the denial of a claim or right which might have been involved therein, but which in fact was never in any way set up or spoken of. (*Dewey v. Des Moines*, 173 U. S. 196, 200;)"

Followed in *Northwestern Bell Telephone Company v. Nebraska Railway Commission*, 297 U. S. 471; *Herndon v. Georgia*, 295 U. S. 441, 442.

If petitioner believed that in the course of his prosecution he was denied any constitutional right, it was his duty to make a proper objection on this ground in the trial court, and in the Supreme Court of Michigan, and ask for rulings thereon, so that the claim would be a matter of record. In this way he might have created a right to have the state court proceedings reviewed by this Court,

> "If a party to an action in a state court intends to invoke for the protection of his rights the Constitution of the United States, or some treaty, statute, commission, or authority of the United States, he must so declare. (*Chapin v. Fye*, 179 U. S. 127.)"

On appeal to this Court, the record must show affirmatively that the objection to the state court proceedings was made

on federal grounds in the court below. *House v. Road Improvement District No. 2,* 266 U. S. 175, 45 Sup. Ct. Rep. 60, 69 L. ed. 229; *Whitney v. People of California,* 274 U. S. 357, 47 Sup. Ct. Rep. 641, 71 L. ed. 1095; *Edward Hines Yellow Pine Trustees v. Martin,* 268 U. S. 458, 45 Sup. Ct. Rep. 543, 69 L. ed. 1050; *Cornell v. Green,* 163 U. S. 75, 16 Sup. Ct. Rep. 969, 41 L. ed. 76; *Appleby v. City of Buffalo,* 221 U. S. 524, 31 Sup. Ct. Rep. 699, 55 L. ed. 839.

Petitioner's claim in his petition for writ of certiorari that the judgment of the Supreme Court of Michigan was against the Fourteenth Amendment to the Federal Constitution is not sufficient justification for allowing certiorari. As stated by Justice Brandeis in *Hiawassee River Power Company v. Carolina-Tennessee Power Company,* 252 U. S. 341, 40 Sup. Ct. Rep. 330, 64 L. ed. 729:

> "If a general statement that the ruling of the state court was against the 14th Amendment were a sufficient specification of the claim of a right under the Constitution to give this court jurisdiction, * * * still the basis for a review by this court is wholly lacking here. For the 14th Amendment was mentioned only in the trial court. In the supreme court of the state no mention was made of it in the assignment of errors; nor was it, so far as appears by the record, otherwise presented to or passed upon by that court. The denial of the claim was specifically set forth in the petition for the writ of error to this court and in the assignment of errors filed here. But obviously that was too late. *Chicago, I. & L. R. Company v. McGuire,* 196 U. S. 128, 132, 49 L. ed. 413, 417, 25 Sup. Ct. Rep. 200. The omission to set it up properly in the supreme court of the state was not cured by the allowance of the writ of error by its chief justice * * *."

The questions which the petitioner suggests in his brief in support of his petition for writ of certiorari as being

constitutional questions are raised for the first time by his petition. From the foregoing authorities it appears that this Court does not now have jurisdiction to entertain the petition.

CONCLUSION

Respondent prays that the petition for writ of certiorari be denied.

Respectfully submitted,

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